IP 04-0773-C T/L Olson v Statewide Transfer
Judge John D. Tinder Signed on 09/23/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JEFFREY M. OLSON,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-00773-JDT-WTL
	)	
STATEWIDE TRANSFER AMBULANCE &	)	
RESCUE INC.,	)	
STAR AMBULANCE SERVICE,	)	
SAMUEL PECK,	)	
LINDA PECK,	)	
MATHEW PECK,	)	
KATHY PECK,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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JEFFREY M. OLSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:04-cv-00773-JDT-WTL
	)	
STATEWIDE TRANSFER AMBULANCE & RESCUE, INC. a/k/a STAR AMBULANCE SERVICE, SAMUEL PECK, LINDA PECK, MATHEW PECK, AND KATHY PECK,	)	
	)	
Defendants.	)	

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT[1]

Jeffrey Olson, a pro se plaintiff, has brought this action claiming that his former employer, Statewide Transfer Ambulance & Rescue, Inc., a/k/a STAR Ambulance Service ("STAR"), violated the Fair Labor Standards Act ("FLSA") by failing to pay him time and one-half for any hours he worked in excess of 40 per week. The case is currently before the court because both Olson and STAR have filed motions claiming to be entitled to summary judgment as a matter of law. For the reasons discussed in this entry, neither of the motions have merit.

I. FACTUAL BACKGROUND

STAR provides ambulance service for both scheduled patient transportation and

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

medical emergencies. Olson worked for STAR from May 5, 1997 through August 29, 2002 as an Emergency Medical Technician ("EMT"). While employed with STAR he was typically scheduled to work 48 hours per week in shifts which would either last 12 or 24 hours. He was paid a fixed salary for the first 48 hours of duty each week. At the time he was employed, STAR informed him that ambulance employees were exempt from overtime compensation because they were considered professionals. STAR claims it believed the FLSA overtime exemption for professionals applied because an EMT was required to have specialized medical certification and training. STAR did pay its EMTs time and one-half for any hours worked in excess of 48 hours in a single week.

Beginning in December 2001, Olson's 24-hour shifts would start at 9:00 p.m. Typically, Olson and others in the EMT position would spend the first hour or so of a work shift inspecting and maintaining the ambulance and related equipment. From 11:00 p.m. until 8:00 a.m., there were no specific assigned duties and unless they were called out on a run, the EMTs were free to sleep in the dormitory provided or utilize other areas of the home-like facility, such as the kitchen, living room, and shower room. In addition, unless on an emergency or assigned run, the EMTs were free to leave the facility in an ambulance with their assigned partners to run errands or obtain meals. Beginning at 8:00 a.m., there were scheduled patient transportation runs which the EMTs were required to complete. Anytime an ambulance went out on a run, the crew was required to complete a "run sheet" which would describe the run including the time the ambulance left and the time it returned. Olson left STAR's employ without ever registering a complaint regarding overtime pay.

In December of 2003, fifteen months after Olson left, STAR announced a new pay policy. Under the new policy it would deduct five hours of sleep time from the pay for a 24-hour shift. At about that same time, the Department of Labor ("DOL") initiated a labor law compliance audit of STAR. The DOL audit covered the time period of January 13, 2002 through January 13, 2004. STAR cooperated fully and provided the DOL with payroll records for that time period which would have included approximately eight months during which Olson was employed. The DOL determined that the professional exemption that STAR had believed applied, did not. As a result of the audit, STAR agreed in the future to pay overtime to its EMTs for all hours worked in excess of 40 hours in a single week and agreed to pay $11,153.31 in back-pay for overtime wages due nine employees identified by the DOL. Olson was not one of the nine employees identified as being owed back-pay for overtime. In calculating the amount due employees for unpaid overtime, the DOL and STAR credited four hours of sleep time against the total number of hours worked in a day if an employee had a four-hour uninterrupted period of time during the night of the shift where no work was required or performed. That was calculated by going back through all the ambulance run sheets for that period of time. Since the EMTs had been paid for 48 hours at the straight time rate, the DOL also approved payment of only the additional half-time portion of pay for hours worked between 40 and 48 hours.

In March of 2004, Olson learned of STAR's FLSA overtime pay violations and later learned of the audit and payments made to other past and present employees. Olson sought the audit results and his own back-pay for overtime from STAR, but STAR

insisted it owed nothing to Olson and continues to maintain that position in defense of this lawsuit. Olson argues that he is entitled to overtime pay for hours worked in excess of 40 per week regardless of the results of the DOL audit and that the time period for which he is owed overtime extends past the time period covered by the audit.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The evidence is construed in the light most favorable to the nonmoving party and all reasonable inferences are drawn in that party's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Further, as a pro se litigant, Olson is entitled to have his pleadings given the broadest construction. *Calhoun v. DeTella*, 319 F.3d 936, 943 (7th Cir. 2003). Only factual disputes that have a bearing on the outcome of the lawsuit, in light of the substantive law, will preclude summary judgment. *Palmer v. Marion County*, 327 F.3d 588, 592 (7th Cir. 2003).

III. DISCUSSION

In seeking summary judgment in its favor, STAR places much reliance on the formulas followed or allowed by the DOL in connection with its audit and the fact that

the audit did not lead to STAR being required to pay Olson for any overtime hours. While a DOL audit might be helpful in determining which employees may have been shorted overtime pay or other entitlements protected by the FLSA, there is simply no legal precedent for finding that the methodology used or the audit results bar anyone not a party to some type of settlement agreement from pursuing their own remedies under the FLSA. In short, just because the DOL sanctioned an agreement with respect to restitution paid by STAR to certain employees does not bar other employees from asserting their rights against STAR for similar legal infractions.

An action under the FLSA for unpaid overtime wages is barred unless commenced within two years of accrual, except that an action arising out of a willful violation may be brought up to three years after the cause of action accrued. 29 U.S.C. § 255(a). Olson first claims that STAR's actions were willful and the three year limitations period should apply allowing him to pursue payment for unpaid overtime back to at least April 30, 2001, three years prior to his filing suit. He further argues that he is entitled to any unpaid overtime for the entirety of his employment on the basis of the statute of limitations being equitably tolled due to STAR's failure to post a required DOL poster and its misrepresentation to him that he was not entitled to overtime. He seeks over $27,000 in unpaid overtime plus liquidated damages.

Equitable tolling in the context of an employment case applies where an employee is unaware of his cause of action because of his inability to obtain vital information bearing on its existence, despite due diligence. *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir. 1990). When determining whether to apply equitable

tolling, a court must ask whether a reasonable person in the plaintiff's position would have been aware of the potential claim. *See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chi. Med. Sch.*, 167 F.3d 1170, 1174 (7th Cir. 1999). Equitable estoppel comes into play where an employer has taken active steps to prevent the plaintiff employee from suing on time. *Cada,* 920 F.2d at 450-51. Examples of acts which would trigger equitable estoppel are the hiding of evidence or a promise not to invoke a limitations bar to a claim. *Jackson v. Rockford Hous. Auth.*, 213 F.3d 389, 394 (7th Cir. 2000).

In this matter, Plaintiff is hard pressed to suggest that a representation to him by STAR at the time of hire that he was not entitled to overtime somehow caused him to miss filing his suit in a timely manner. This is especially true when he asserts in his Complaint that over the years, a number of employees had questioned STAR's overtime policies. If, while he was employed, he was aware of such questions regarding overtime being posed, it is hardly fair for him to assert that STAR's statement to him when he was hired kept him from filing a timely claim. On the other hand, if the evidence were to establish that in addition to the representation by STAR to Olson at the time of his hire that he was not entitled to overtime, STAR also failed to display the required DOL posting regarding employee overtime and minimum wage rights, then a much better case for the application of equitable tolling or equitable estoppel exists.[2]

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[2] In *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977), the Court of Appeals for the Third Circuit found that the failure of an employer to display the statutorily required postings of employee rights under the Age Discrimination in Employment Act tolled the statute of limitations at least until the employee was able to discern his rights or contact an attorney. Other courts have followed *Bonham* when

With the parties submitting conflicting affidavits regarding whether or not the informational posters were displayed at the workplace, the court is left with a question of fact that cannot be resolved without weighing the testimony of witnesses for both parties.

The standard for determining whether a violation is willful for purposes of establishing whether a two or three year statute of limitations applies in an FLSA case is the same as is used to determine if liquidated damages are available under the Age Discrimination in Employment Act. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). Thus, a violation is willful if the defendant either knew its conduct violated the FLSA or showed reckless disregard for whether or not the actions complained of violated the Act. *Id.* at 133. Willfulness requires more than simple negligence. *Id*. While STAR claims that it honestly believed a professional exemption applied and Olson offers little to counter that notion, the question of a party's intent and the reasonableness of its conduct are rarely issues that can be decided as a matter of law. Consequently, passing judgment on the issue of when the statute of limitations is properly applied in this case is inappropriate at this time.

Regardless of whether the two year statute of limitations is tolled or extended, Olson is entitled to at least pursue recovery for any unpaid overtime during the last five

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considering whether to toll the statute of limitations for FLSA actions where required postings were not made by an employer, s*ee, e.g. Cortez v. Medina's Landscaping, Inc.*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); however, the Seventh Circuit has yet to rule on whether the failure to post alone is sufficient to invoke equitable tolling.

months of his employment. Those months fall within the two year limitations period. As indicated previously, the fact that those five months also were part of the DOL audit does not preclude a recovery on his part so long as he establishes an entitlement to overtime pay under the law. Accordingly, there is no limitations bar to Olson's lawsuit and, absent some other defense capable of determination as a matter of law, STAR is faced with a trial.

With his motion for summary judgment, Olson has submitted copies of pay stubs which he claims establish that he was not paid for at least 16 hours of overtime in nearly every two week pay period. He asks the court to grant him summary judgment on the issue of his entitlement to this overtime pay based upon his submission and his affidavit. While the pay stubs may help establish his claim, their contents are not easily deciphered and standing alone are insufficient to eliminate questions of fact regarding how many hours were actually worked in any given week and how much overtime went unpaid.

Further, STAR has asserted an argument for allowing it to deduct sleep time from the 24-hour shift periods served by Olson based upon an implied agreement between it and all EMTs, including Olson. STAR maintains that, at least with respect to time periods prior to its deducting 5 hours of pay for sleep time on 24-hour shifts, in exchange for their employment as EMTs and the payment at straight time for all 24 hours of a shift, the employees impliedly agreed to except the sleeping time from computation for overtime purposes. The regulations would appear to support the existence of such implied agreements under some circumstances where employees

work 24-hour shifts.[3] STAR not only asserts this implied agreement as a defense to Olson's summary judgment motion, but claims the issue to be so clear as to require that summary judgment be entered in its favor. However, whether or not an agreement between an employer and its employees with regard to sleep time should be implied and the scope of that agreement are inescapably mixed questions of fact and law. The answers to those questions turn on what each party understood and whether or not the conditions were such that the employees truly were able to commit the time at issue to sleep or their own chosen activities. *Bell v. Porter*, 159 F.2d 117, 120 (7th Cir. 1947). Such questions may not be answered on the record as it exists now.

IV. CONCLUSION

Neither Olson nor STAR are entitled to a summary judgment. While it is clear that the statute of limitations is no bar to Olson pursuing his claim, whether or not his claim may extend further than the four or five months he worked during the two years prior to filing suit based upon the statutorily prescribed additional year for willful violations or due to equitable tolling is not a question which can be answered on the

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[3] 29 C.F.R. § 785.22 provides in pertinent part:

Duty of 24 hours or more.

(a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

record before the court. Nor can the current record support a decision as to whether or not an agreement should be implied, under 29 C.F.R. § 785.22, relative to the deduction of sleep time from the computation of hours at work for overtime purposes.

Accordingly, Plaintiff's Motion for Summary Judgment (Docket #33) is **DENIED** and Defendants' Cross Motion for Summary Judgment (Docket #46) is also **DENIED**.

ALL OF WHICH IS ORDERED this 23rd day of September 2005.

John Daniel Tinder, Judge
United States District Court

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